

FEDERAL CIRCUIT COURT OF AUSTRALIA

*SUN & ORS v MINISTER FOR IMMIGRATION &
ANOR*

[2015] FCCA 2479

Catchwords:

MIGRATION – Business Skills (Residence) (Class DF subclass 892 State/Territory Sponsored Business Owner) visa – whether documents provided to tribunal were bogus documents – where tribunal found document were bogus documents.

Legislation:

Migration Act 1958 (Cth), s.97

Migration Regulations 1994, regs.1.03, 1.11, 1.11A, Schedule 2 cl.892.211, 892.221, 892.223(a); Schedule 4 PIC 4020

Cases cited:

Batra v MIAC (2013) 212 FCR 84

George v Rockett (1990) 170 CLR 104

Hussien v Chong Fook Kam [1970] AC 942

Jasbeer Singh v Minister for Immigration and Ethnic Affairs (Unreported, Federal Court of Australia, 6 December 1994, NG319/1994)

Mudiyanselage v MIAC (2013) 211 FCR 27

NBDY v Minister for Immigration and Multicultural Affairs [2006] FCAFC 145

Singh v Minister for Immigration & Anor [2013] FCCA 1435

Tarasovski v Minister for Immigration, Local Government and Ethnic Affairs (1993) 45 FCR 570

First Applicant: JIBO SUN

Second Applicant: YUECHANG TAN

Third Applicant: JUNHAO SUN

First Respondent: MINISTER FOR IMMIGRATION &
BORDER PROTECTION

Second Respondent: MIGRATION REVIEW TRIBUNAL

File Number: BRG 539 of 2013

Judgment of: Judge Jarrett

Hearing date: 27 March 2014
Date of Last Submission: 27 March 2014
Delivered at: Brisbane
Delivered on: 11 September 2015

REPRESENTATION

Counsel for the Applicants: Ms Brennan
Solicitors for the Applicants: Hartnett Lawyers
Counsel for the Respondents: Mr Smith
Solicitors for the Respondents: Sparke Helmore Lawyers

ORDERS

- (1) The further amended application filed on 6 March, 2014 be dismissed.
- (2) The applicants pay the first respondent's costs of and incidental to the application fixed in the sum of \$6,825.00.

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT BRISBANE

BRG 539 of 2013

JIBO SUN

First Applicant

YUECHANG TAN

Second Applicant

JUNHAO SUN

Third Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

MIGRATION REVIEW TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. By their further amended application filed on 6 March, 2014 the applicants seek judicial review of a decision of the second respondent made on 3 June, 2013 which affirmed a decision of a delegate of the first respondent to refuse the applicants Business Skills (Residence) (Class DF subclass 892 State/Territory Sponsored Business Owner) visas. The applicants seek relief in the form of writs of certiorari and mandamus.

2. Generally speaking, the issue in this application is whether the second respondent was correct when it found that the applicants had given to the tribunal bogus documents within the meaning of that term as used in public interest criteria 4020 of schedule 4 to the *Migration Regulations 1994*.

Background

3. On 5 January, 2010 the applicant, Jibo Sun, applied for a Business Skills (Residence) (Class DF subclass 892 State/Territory Sponsored Business Owner) visa. The other applicants, Yuechang Tan and Junhao Sun are members of Mr Sun's family unit and they sought visas as members of his family unit. Their entitlement to visas is entirely dependent upon the success of Mr Sun's application. They advance no independent grounds for the grant of a visa.
4. To be successful in his visa application, Mr Sun needed to satisfy the numerous criteria prescribed by the *Migration Act 1958* (Cth) and the *Migration Regulations 1994* that were applicable to the class of visa for which he had applied. One criterion, set out in cl.892.221 of Schedule 2 to the Regulations, was a criterion to be satisfied at the time of the decision on his visa application. It required Mr Sun to demonstrate that he continued to satisfy the criteria in cl.892.211 and 892.214 of schedule 2 to the Regulations.
5. For present purposes, cl.892.211 is relevant. It required that Mr Sun demonstrate that he continued to have, an ownership interest in 1 or more actively operating main businesses in Australia. The proper interpretation of cl.892.211 is dependent upon the definitions of *main business* and *ownership* found in regs.1.11 and 1.11A of the Regulations.
6. To demonstrate satisfaction of cl.892.211 at the time of the decision on his visa application (and thereby cl.892.221), Mr Sun claimed to have been involved in two Australian companies, Joyful View Garden Real Estate Development Resort Co Pty Ltd and Aquamarine International Tour & Assessment Co Pty Ltd which together traded as "Cherrabah Resort". He claimed that he had been a manager of the companies since September, 2004 and a director since August, 2009. There were two other directors, Mr Wenxing Ma and Mr Wenwei Ma, who had

been directors since 2004. He claimed that those matters demonstrated that he met the requirements of cll. 892.211 and 892.221 of schedule 2 of the Regulations.

7. On 21 May, 2010 a delegate of the first respondent refused the visa application. One of the grounds for the refusal was that the delegate was not satisfied that the first applicant had maintained direct and continuous involvement in Mr Sun's nominated *main business* as required by the Regulations. The respects in which the delegate thought that Mr Sun did not meet the criterion are not particularly important for the purposes of these reasons. However, Mr Sun's application failed at this hurdle before the first respondent's delegate.
8. Mr Sun sought a review of the delegate's decision by a migration review tribunal. Not surprisingly, the issue that concerned the first respondent's delegate, also concerned the tribunal. In response to correspondence from the tribunal, Mr Sun produced a significant number of documents related to the management of the nominated *main business* and his role in it. Of those documents, 11 caught the attention of the tribunal. The documents were the same as, or similar to, documents that had been submitted to the first respondent's department in connection with visa applications made by Mr Sun's co-directors Mr Wenxing Ma and Mr Wenwei Ma. The tribunal's concerns are set out in the following paragraph:

41. As the Tribunal also had access to the Class DF applications of Mr Wenxing Ma and Mr Wenwei Ma, it noted that some of the same documents had been submitted to the Department in relation to their respective visa applications. In some of the documents, the signature of Mr Wenwei Ma was no longer present and the signature of Mr Sun appeared in their place. In other documents, the version of the document given to the Department in 2009 did not include the signature of Mr Sun. Some of the invoices were, according to the document date, signed by Mr Sun when he was not present in Australia.

9. At a hearing that occurred on 28 November, 2012 the tribunal put to Mr Sun its concerns with respect to each of the eleven documents. The tribunal clearly put him on notice that there had to be no evidence that Mr Sun had given the tribunal a bogus document or evidence that was false or misleading in a material particular relevant to the visa. The

tribunal pointed out that the information about the signatures may lead the tribunal to find that the relevant documents were bogus documents because they had been altered by a person who did not have authority to do so, or the documents were counterfeit as the signatures did not appear when the document was presented to the Department at an earlier time. The tribunal raised a number of other concerns with Mr Sun and took evidence from a witness called by Mr Sun. The tribunal heard submissions from his representative.

10. By a letter dated 19 December, 2012 sent pursuant to s.359A of the Act the tribunal suggested that signatures or words that appeared in the relevant documents had been removed and that Mr Sun's signature appeared in their place. The tribunal identified each of the documents in question. In its reasons for decision, the tribunal summarises the letter:

88. The Tribunal stated this information is relevant to the review because it may lead the Tribunal to find that these documents have been altered by removing some of the signatures and replacing them with those of Mr Sun, or adding the signature of Mr Sun to the documents in order to enhance his application for the visa and was not a true representation of Mr Sun's claimed role in the businesses. The Tribunal stated this may lead it to find that he has given, or caused to be given a bogus document or information that is false or misleading in a material particular in relation to his application for the visa. The Tribunal stated this may also lead the Tribunal to find that he could not meet an essential criteria for any other visa subclass in Class DF.

89. The Tribunal also invited the applicants to provide information in relation to the issue of the waiver of PIC 4020(1). The applicants were provided until 16 January 2013 to provide comments or response. The representative requested additional time to make submissions and this was granted until 15 February 2013.

11. All of this was important because cl.892.223(a) of schedule 2 to the Regulations specified other criteria that Mr Sun needed to satisfy at the date of the decision on his visa application. Those criteria were public interest criteria 4001, 4002, 4003, 4004, 4007, 4009, 4010, 4020 and 4021 set out in Part 1 of schedule 4 to the Regulations. Of interest in this case is PIC 4020. Relevantly, PIC 4020 required that:

(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse to grant the visa;

the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

information that is false or misleading in a material particular means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

12. Regulation 1.03 provides that a *bogus document* has the same meaning as in s.97 of the Act, which at the relevant time stated:

97 Interpretation

Bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or*
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or*
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.*

13. In reply to its s.359A letter of 19 December, 2012 the tribunal received a submission from Mr Sun's representative by facsimile on 15 February, 2013.
14. On 3 June, 2013 the tribunal affirmed the delegate's decision, concluding at [119] of its decision that:

119. The evidence leads the Tribunal to reasonably suspect that the 11 documents given by the applicants to the Tribunal have been altered by a person not authorised to do so because of the other versions of the same document provided to the Department in the visa applications of Mr Wenxing Ma or Wenwei Ma in which the signature of Mr Sun does not appear. This leads the Tribunal to find that the applicants have given the Tribunal bogus documents in connection with the application. The Tribunal notes that at the time these documents were signed and dated, Mr Sun had not been appointed as a Director of the company, held 10 percent of shares and claimed to be the Import and Receiving Manager and the Tribunal does not accept as plausible that he had any role in approving or indicating his approval for the expenditure of monies for contracts relating to building work, construction, plumbing, heating, signage or storage.

120. On the information before it, the Tribunal finds that the 11 documents submitted by the applicants to the Tribunal were bogus documents. The Tribunal finds that there is evidence before it

that the applicants have given, or caused to be given to the Tribunal in relation to the visa application a bogus document within the meaning of paragraph (b) of the 'bogus document' definition in s.97 of the Act. Accordingly, the Tribunal finds that the applicants do not satisfy PIC 4020(1)(a).

The grounds of review

15. By their further amended application filed on 6 March, 2014 the grounds of review relied on by the applicants are:

1. The Tribunal, in making its decision on 3 June 2013, fell into jurisdictional error insofar as it made errors of law, which caused the Tribunal to reach the mistaken conclusion that there was evidence that the applicants had given "bogus documents" to the Tribunal within the meaning of that phrase in cl 4020(1) of Sch 4 of the Migration Regulations 1994 (Cth) ("the Regulations"), and such mistaken conclusion affected its exercise of its power under s 349 of the Migration Act 1958 (Cth) ("the Act")

16. Particulars of errors of law

a) The Tribunal misdirected itself in law as to which party carried the burden of proof, and the standard of proof to be met as to whether the documents in question were "bogus documents" within the meaning of that phrase in cl 4020(1) of Sch 4 of the Regulations.

b) The Tribunal misdirected itself in law as to the proper construction of the phrase "a document that ... has been altered by a person who does not have authority to do so" in section 97(b) of the Act.

c) The Tribunal misdirected itself in law as to the test of reasonable suspicion to be applied under section 97(b) of the Act.

2. The Tribunal's decision was affected by jurisdictional error when it relied upon the eleven documents identified in paragraph [87] of the Tribunal's reasons for decision when:

(a) none of those documents were relevant to the issue before the Tribunal as to the applicant's involvement in continuously managing the relevant business from day to day during the relevant period, that is from 6 January 2008 to 5 January 2010;

and, or in the alternative,

(b) none of those documents were given or caused to be given by the application to the Tribunal in relation to the applicant's application for the visa within the meaning of PIC 4020.

Consideration

17. There is no contention that for the purposes of the visa applications, Mr Sun gave, or caused to be given, to the tribunal the eleven documents in question. Further, there is no contention that each of the relevant documents was not a *document* for the purposes of PIC 4020 and s.97 of the Act.
18. The tribunal found that the documents had been altered for the purposes of s.97(b) of the Act and the definition of *bogus document*. The applicants argue that in doing so, the tribunal misapplied the burden and standard of proof related to those findings. They contend that the tribunal cast a burden on the applicants to satisfy the tribunal that the documents had not been altered and therefore were not bogus documents. Further, they argue that the tribunal did not appreciate that the evidence must establish the relevant facts leading to the finding that the documents were bogus to a high degree of satisfaction.
19. *Jasbeer Singh v Minister for Immigration and Ethnic Affairs* (Unreported, Federal Court of Australia, 6 December 1994, NG319/1994) concerned s.20 of the Migration Act as it stood in 1994. That section appears to be the forerunner of the present PIC 4020 and s.97 of the Migration Act. Sackville J considered s.20 of the Act, as it existed at that time. His Honour said, at page 8, that:

[n]ot only is the onus of establishing the facts on the Minister, but in applying that onus it is necessary to consider the serious consequences of falling within s.20(2).
20. As to the standard of proof, in *Jasbeer* Sackville J referred to the judgment of Wilcox J in *Tarasovski v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 570. In *Tarasovski*, Wilcox J said at page 572 that a contravention of s.20 requires evidence to establish the contravention to “a high degree of satisfaction”.

21. Those statements of principle have been applied to the determination about whether a document is a bogus document for the purposes of s.97 of the Act: *NBDY v Minister for Immigration and Multicultural Affairs* [2006] FCAFC 145. Of this case, the applicants submit that the Full Court of the Federal Court “has concluded that the burden and standard of proof as stated in [*Jasbeer Singh* and *Tarasovski*] are equally applicable to determining whether or not a document is a “bogus document” within the meaning of section 97 of the Act”.
22. Indeed, in their joint-judgment at [31], Branson and Stone JJ held that:
- The [relevant tribunal] correctly directed itself as to the **level of proof** required in finding that the appellants had made false statements and the fact that the **onus of discharging this burden lay on the Minister**. In doing so it appropriately cited *Jasbeer Singh v Minister for Immigration and Ethnic Affairs* [1994] FCA 1011 and *Tarasovski v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 45 FCR 570.*
- (my emphasis).
23. However, in my view reliance on *NBDY* and *Jasbeer Singh* is misplaced. In each of those cases, the decisions under review by the Court concerned whether the applicants in those cases had produced a bogus document or made a statement that was false or misleading. That is to say, in each of those cases, the decision maker was concerned with a positive finding that the applicant had produced a bogus document or made a statement that was false or misleading.
24. PIC 4020 is different. It requires that there be no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular.
25. Here the tribunal formed held concerns about the authenticity of eleven documents supplied by Mr Sun. On their face, the concerns were appropriate. The tribunal articulated the concerns in detail both during the tribunal’s hearings and afterwards in writing. Mr Sun was invited to, and did, respond to the tribunal’s concerns. The tribunal carefully analysed Mr Sun’s claims about the documents and explained why it

did not find his accounts credible and why it concluded that the documents provided were bogus documents.

26. I accept the first respondent's submissions that *NBDY* was decided in a different legislative context. In that case the legislative context in which it was decided was "where the Minister was statutorily empowered to cancel a person's visa if satisfied that the person had provided bogus documents to the Minister". PIC 4020 is not to the same effect. PIC 4020 applies to prospective visa applicants; it does not give the Minister a power to cancel visas that have already been granted.

27. The first respondent drew my attention to the judgement in *Singh v Minister for Immigration & Anor* [2013] FCCA 1435, where Judge Cameron stated at [25] that:

For a document to be considered bogus, it is only necessary that the decision-maker "reasonably suspect" that it

(a) Purports to have been, but was not, issued in respect of the person; or

(b) Is counterfeit or has been altered by a person who does not have authority to do so; or

(c) Was obtained because of a false or misleading statement, whether or not made knowingly.

*A failure to meet the requirement of PIC 4020 will occur if there is evidence of a bogus document having been submitted. If a document which is found to be bogus under the relatively undemanding test in s.97 has been submitted in connection with a visa application, no more is needed to show that there is evidence of the sort referred to in PIC 4020. Consequently, although use of the word "evidence" in PIC 4020 may imply the need for probative evidence, as the criterion in this respect only requires evidence that a bogus document has been submitted, not that a document that has been submitted is bogus, in that respect it operates very differently from the criterion discussed in *Talukder*.*

28. With respect, I agree with this interpretation of the requirements of PIC 4020. In those circumstances, it is inappropriate to consider that there

is an legal onus or burden of proof on either the Minister or a visa applicant arising from PIC 4020.

29. In my view, the tribunal has not misdirected itself in law as to which party carried the burden of proof, and the standard of proof to be met as to whether the documents in question were “bogus documents”. The tribunal identified the correct approach at [108] of its reasons for decision where it said:

The Tribunal will now consider whether there is no evidence before it that the applicants have given, or caused to be given to the Tribunal in relation to the visa application, a bogus document.

30. And the tribunal did so. It found that there was such evidence. No basis exists for disturbing that finding of fact. It was, in any event, clearly correct.
31. This ground relied upon by the applicants fails to establish a jurisdictional error.

Reasonable suspicion

32. The applicant contends that the tribunal “misdirected itself in law as to the test of reasonable suspicion to be applied under s.97(b) of the Act.”
33. The applicants’ argument can be summarised as follows. *First*, the applicant refers to the proposition that “[t]he facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown”: *Hussien v Chong Fook Kam* [1970] AC 942 and endorsed by in *George v Rockett* (1990) 170 CLR 104. *Second*, Mr Sun contends that the tribunal, in its conclusions, made “findings of suspicion” as opposed to findings of fact. Therefore, the applicants submit that it is not clear whether the requisite factual basis for suspicion existed. The applicant also argues that the tribunal misdirected itself in this way partly due to the first respondent failing to carry the burden of proof.
34. The applicants’ reference to a “finding” of suspicion is confusing. The submissions do not explain what is meant by this notion. What is a “finding” of suspicion? In the context of s.97, it seems to me, a

tribunal's reasonable suspicion is a conclusion reached on the basis of material before the tribunal, not a "finding".

35. In any event, the tribunal did identify the material upon which it formed its suspicion. The tribunal set out, at length, the matters that concerned it about the eleven documents in question. It set out its findings about Mr Sun's explanations about the issues that concerned the tribunal at paragraphs [110] – [118] of its reasons for decision.
36. Those findings and the evidence referred to extensively by the tribunal in its reasons for decision led the tribunal to the conclusions recorded at paragraph [14] above. Those findings and conclusions were plainly open to the tribunal on the material before it.
37. This ground fails to establish jurisdictional error.

Relevance

38. On 10 December, 2013 the applicants were given leave to amend their application to include an additional ground of review. The applicant's took that opportunity. The additional ground has two limbs.
39. *First*, it is said that the eleven documents were not relevant to the issue that was taxing the tribunal, namely the level of involvement that the first applicant had in managing the relevant companies and business. *Second*, the applicant argues that the eleven documents were not given "in relation to" the visa application within the meaning of PIC 4020. The applicants submit that "the Tribunal failed to ask itself the critical question, i.e. whether the 11 documents were bogus documents supplied to it in relation to the 5 January 2010 application for a subclass 892 visa."
40. The tribunal proceeded on the footing that a "bogus document" does not have to be relevant to a visa criterion in order for PIC 4020 to be engaged: *Batra v MIAC* (2013) 212 FCR 84. PIC 4020 merely requires that there must be no evidence that the applicant has given or caused to be given a bogus document to the decision maker: *Mudiyanselage v MIAC* (2013) 211 FCR 27.
41. However, the applicants contend these cases "are not authority for such a wide construction". The applicants' argument is that there must be a

“nexus” between a bogus document and the grant of the visa. A nexus is required because the words “in relation to” in PIC 4020(1) suggest such a nexus. Moreover, PIC 4020(2) prohibits further subsequent applications if an applicant (or a family member) fails to satisfy PIC 4020(2). The purpose of the legislative context surrounding the definition of “bogus document”, which according to Murphy J in *Batra* (at [57]) is “the maintenance of an effective migration system...”.

42. The applicants also submit that the necessity for a nexus was evident in *Mudiyanselage*. They contend that in that case, even though the allegedly bogus document was withdrawn at the time of the tribunal hearing, because the document was a skills assessment—and the visa applied for was a skilled 885 visa—there was a sufficient nexus relied on by the Court to nevertheless find that a bogus document had been submitted in relation to the application. However, the Court in that case clearly decided that the mere submission of a bogus document is sufficient to attract the operation of PIC 4020 regardless of the contents of the document. At [35], Tracey J indicated that the definition of *bogus document* does not have a materiality requirement and if it did, that would undermine the effectiveness of the migration system, by giving applicants an impunity to submit bogus documents in attempt bolster their success while having the option of withdrawing their reliance on them should they be discovered as bogus.
43. Neither limb of this ground of review has any merit. This additional ground fails to establish jurisdictional error.

Authority to alter

44. The applicant argues that the tribunal erred in its findings regarding the applicant’s lack of authority to alter the eleven subject documents.
45. This argument has two aspects. *First*, the applicant posits that since the Cherrabah Resort companies presumably had ownership rights over the relevant documents, it follows that they had the right “to authorise others to also alter each of those documents”. Hence, the applicant argues that the question the tribunal should have asked was whether the applicant had in fact been authorised by the companies to alter the eleven documents, whereas the question the tribunal in fact asked, the applicant suggests, was whether it was within the ordinary course of

the applicant's role to mark the documents in the manner they were altered. *Second*, assuming the tribunal had asked the former question, the question became one of fact to be determined by the law of agency. Accordingly, the issue was whether the applicant held either express or implied actual authority to alter the documents. Proceeding from the assumption that the Minister held the burden of proof regarding s.97 of the Act, the applicant concludes that the Minister had the burden of proving a negative proposition: that the applicant lacked express or implied authority to alter the eleven documents.

46. However, in my opinion this issue is a red herring. The primary issue for s.97 in terms of authority is whether the decision maker reasonably suspects there was a lack of authority — not whether authority was lacking as a matter of fact. They are different questions. I have already dealt with the question of reasonable suspicion. Moreover, the applicant's suggestion that the Minister had the burden of proving the negative suggestion should be rejected for the reasons set out above concern the burden of proof.

Conclusion

47. No jurisdictional error is established. The application must be dismissed with costs.

I certify that the preceding forty-six (46) paragraphs are a true copy of the reasons for judgment of Judge Jarrett

Associate:

Date: 11 September 2015